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B-259182.2

The Honorable Sheila E. Widnall
The Secretary of the Air Force

Dear Madam Secretary:

Enclosed is a copy of our decision of today concerning the request for declaration of entitlement to costs filed by Multi-Bloc, Inc., in connection with its protest of the award of a contract to Caswell International Corporation under invitation for bids No. F32605-94-B-0041, issued by the Department of the Air Force for a bullet trap.

After the protester submitted its comments on the agency report, the agency reexamined the specification at issue; concluded that it exceeded its minimum needs; and decided to terminate the awardee's contract and resolicit under an amended solicitation. Under these circumstances, and since the Air Force has agreed, we find that Multi-Bloc is entitled to recover the costs of filing and pursuing its protest, including reasonable attorneys' fees. Multi-Bloc should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the agency within 60 working days of receipt of this decision.

Sincerely yours,

/s/ James F. Hinchman
for Comptroller General
of the United States

Enclosure



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Multi-Bloc, Inc.--Entitlement to Costs

File: B-259182.2

Date: April 20, 1995

Charles D. Ablard, Esq., Jeff H. Eckland, Esq., and William L. Roberts, Esq., Faegre & Benson, for the protester.

Marcia Bachman, Esq., Department of the Air Force, for the agency.

Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is entitled to the costs of filing and pursuing its protest that the brand name item offered by the awardee under a brand name or equal procurement did not meet one of the solicitation's salient characteristics, where, after the protester submitted its comments on the agency report, the agency reexamined the specification at issue; concluded that it exceeded its minimum needs; and decided to terminate the awardee's contract and resolicit under an amended solicitation.

DECISION

Multi-Bloc, Inc. requests that we declare it entitled to reimbursement of its costs of filing and pursuing a protest challenging the award of a contract to Caswell International Corporation under invitation for bids (IFB) No. F32605-94-B-0041, issued by the Department of the Air Force for a bullet trap. Multi-Bloc contends that the agency unduly delayed taking corrective action in response to its protest. The Air Force agrees that the protester is entitled to recover these costs.

We find that Multi-Bloc is entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees.

The Air Force issued this solicitation on August 22, 1994, as a brand name or equal procurement for a bullet trap to be used at the firing range at the Grand Forks Air Force Base, North Dakota. The brand name item was listed as Caswell's Model LE9C, and the solicitation set forth five salient characteristics for the bullet trap. One of these salient

characteristics was that the bullet trap be capable of withstanding "occasional fire of armor piercing . . . 50 caliber [ammunition]." The solicitation did not require the submission of descriptive literature.

The Air Force received three bids in response to the solicitation. Caswell submitted the apparent low bid of \$163,235 for its brand name model bullet trap. Multi-Bloc and a third bidder submitted bids for "equal" bullet traps, at prices of \$247,000 and \$483,325, respectively. The contracting officer conducted a "price only" evaluation of Caswell's apparent low bid, and awarded the contract to Caswell on September 30. On that same day, the agency sent a letter to the unsuccessful bidders notifying them of the award decision. On October 17, Multi-Bloc filed an agency-level protest of the award, alleging that Caswell's Model LE9C bullet trap would not handle the occasional firing of 50-caliber armor-piercing ammunition, as required by the solicitation. After the Air Force dismissed the agency-level protest, on October 31, Multi-Bloc filed a protest in our Office, repeating the same raised allegation concerning Caswell's bullet trap.

In its agency report filed December 9, the Air Force stated that it had improperly dismissed the agency-level protest, and explained that, after the agency-level protest was filed, the contracting officer telephoned Caswell's representative and asked if its bullet trap met the salient characteristic at issue. Caswell's representative confirmed that its Model LE9C bullet trap was not designed for full-time use of 50-caliber armor-piercing ammunition, and stated that some damage could be expected with "more than occasional use." The Air Force argued that its award to Caswell was proper, since there was no evidence to contradict Caswell's assertion that occasional use armor-piercing ammunition could be accomplished by its bullet traps.

In its December 22 comments on the agency report, Multi-Bloc presented the affidavit of a ballistics expert who attested that Caswell's Model LE9C bullet trap, constructed of steel, is not capable of handling the occasional fire of 50-caliber armor-piercing ammunition. This type of armor-piercing ammunition is made of hardened steel, as opposed to typical ammunition, which is made of lead or is lead-jacketed. The expert referenced an attached Caswell safety alert which warns that "no non-lead rounds should be shot at any steel bullet traps."

On January 9, 1995, the Air Force notified our Office that, in reviewing the protester's comments, the base contracting officer found that the solicitation's specifications exceeded the government's requirements--the base did not

plan to fire armor-piercing rounds at the Grand Forks firing range, and did not need to purchase the extra protection of a bullet trap that would handle even the occasional firing of such rounds. Since the agency's decision to terminate Caswell's contract and amend the original solicitation made the protest academic, our Office dismissed it on January 11.

Multi-Bloc filed this request on January 24, arguing that it expended substantial effort and expense to respond to the agency report, including its retention of a ballistics expert to analyze the Caswell bullet trap and render his opinion as to whether it met the salient specification. The protester asserts that the Air Force engaged in undue delay before deciding to terminate Caswell's contract, as it provided no explanation for its failure to earlier realize that the solicitation went beyond the agency's minimum needs.

Multi-Bloc contends that it is entitled to recover the costs of filing and pursuing its protest, including reasonable attorneys' fees, under section 21.6(e) of our Bid Protest Regulations. Under that provision, we may declare a protester entitled to costs, including reasonable attorneys' fees, where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest.

Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. In response to Multi-Bloc's request, the Air Force agrees that the protester is entitled to recover its protest costs, reserving judgment only with respect to the quantum of those costs.

The Air Force's January 9 letter concedes that the decision to terminate Caswell's contract and resolicit was taken in response to the protest.¹ The remaining question is whether the agency's action was prompt under the

¹In its letter notifying us of the decision to terminate Caswell's contract, the Army stated that it "decided to take this action without reaching a determination of whether Caswell's product did or did not meet the solicitation requirements." While the Army's decision to terminate the contract thus was not in direct response to the issue raised in the protest, Multi-Bloc's challenge to Caswell's product did require the agency to review the specification regarding armor-piercing ammunition, and ultimately led the agency to conclude that the specification was overstated and that Caswell's contract should be terminated. Thus, we agree that the Army's action was taken at least in part in response to Multi-Bloc's protest. Control Corp.; Control Data Sys., Inc.--Protest and Entitlement to Costs, B-251224.2; et al., May 3, 1993, 93-1 CPD ¶ 353.

circumstances. Ostrom Painting & Sandblasting, Inc.--
Entitlement to Costs, B-250827.2, May 18, 1993, 93-1 CPD
 ¶ 390. We conclude that it was not.

In its January 9, 1995, notice to our Office, the agency stated that it was taking corrective action because, when the contracting officer reviewed Multi-Bloc's comments, she found that the solicitation's specifications exceeded the government's requirements--the base did not plan to fire armor-piercing rounds at the Grand Forks firing range. The Air Force does not explain why this discovery was not made when the salient characteristic concerning this matter was highlighted in Multi-Bloc's October 17 agency-level protest, and again in Multi-Bloc's protest to our Office, filed October 31. The record is devoid of any reason why the Air Force went to the effort of filing an agency report with our Office defending Caswell's compliance with this salient characteristic, including a supporting statement by the contracting officer, when, according to that same contracting officer, this salient characteristic exceeded the agency's minimum needs. The information contained in the protester's comments was not necessary for the agency to take its corrective action.

Under these circumstances, and since the Air Force has agreed, Multi-Bloc is entitled to recover the costs of filing and pursuing its protest, including reasonable attorneys' fees. Communications-Applied Tech. Co., Inc.--Request for Entitlement, B-233561.5, Jan. 21, 1994, 94-1 CPD ¶ 26; Carl Zeiss, Inc.--Entitlement to Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274. Multi-Bloc should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the agency within 60 working days of receipt of this decision.
 4 C.F.R. § 21.6(f)(1) (1995).

/s/ James F. Hinchman
 for Comptroller General
 of the United States